Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1979

No. 79-673

PROVIDENCE JOURNAL COMPANY,
Petitioner,

—v.—

FEDERAL BUREAU OF INVESTIGATION, ET AL.,
Respondents,

RAYMOND L. S. PATRIARCA,
Intervenor-Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

WILLIAM M. KUNSTLER
853 Broadway
New York, New York 10003
(212) 674 - 3303

HARRIS L. BERSON
215 Broadway
Providence, Rhode Island 02903
(401) 272 - 3900
Counsel for Intervenor-Respondent

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Intervenor-Respondent, Raymond L. S. Patriarca, respectfully prays this Court to deny the Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit to review the unanimous decision of that court in reversing the Final Judgment of the United States District Court for the District of Rhode Island granting declaratory judgment in favor of petitioner. The decision of the Court of Appeals is reported at 602 F.2d 1010 (1979), and that of the District Court at 460 F. Supp. 778 (D.R.I. 1978). On December 3, 1979, all nonfederal respondents were granted an extension of time to and including December 13, 1979, to file responses to the said Petition.

Jurisdiction

The District Court entered its Final Judgment granting declaratory relief to petitioner on October 5, 1978. See Appendix B to Petition for Writ of Certiorari (Petition). On July 27, 1979, the Court of Appeals issued its opinion reversing the said Final Judgment. See Appendix A to Petition. This Court has jurisdiction to review the decision of the Court of Appeals pursuant to Title 28 U.S.C., Section 1254(1).

Question Presented

1. Whether the contents of wire or oral communications intercepted prior to June 19, 1968, the effective date of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510-2520, by means of an electronic, mechanical or other device in violation of the Constitution or Federal law are exempt from disclosure under the Freedom of Information Act, 5 U.S.C. 552, on the ground that their disclosure would constitute an unwarranted invasion of personal privacy?

Constitutional and Statutory Provisions Involved

The Fourth Amendment to the Constitution of the United States:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Relevant portions of the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, and Title III of the Omnibus Crime Control and Safe Streets Act of 1968 ("Title III"), 18 U.S.C. §§ 2510-2520, appear as Appendices D and F to the Petition, respectively.

Statement of the Case

In general, intervenor-respondent concurs in the Statement of the Case as set forth in the Petition at pp. 2-6. However, he does not agree with petitioner's assertions that "[T]here is no evidence in the record as to whether the surveillance violated the Fourth Amendment," *Ibid*, p. 3, fn. *, inasmuch as the Travel of *United States* v. *Taglianetti*, 274 F. Supp. 220, 226 (D. R.I. 1967), *aff'd*, 398 F.2d 558, 569 (1st Cir. 1968), *aff'd per curiam*, 394 U.S. 316, 317 (1969), clearly reveals that the electronic surveillance here involved was illegal.* Furthermore, he takes issue with the contention that the Court of Appeals reversed *"on a ground that had not been urged or briefed by any of the parties at any stage of the litigation."* *Ibid.*, p. 6 (italics in original). It is the claim of intervenor-respondent that the Court of Appeals adopted, under a narrowing principle, the essential spirit of his argument that, given the specific facts of this case, disclosure should be prohibited where the requested material has been illegally obtained. As the Court of Appeals put it, "Moreover, the circumstances of this case are unique and present a particularly compelling argument for considering the manner in which the information was obtained." *Ibid.* at 1014.

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* The Court of Appeals referred to the method of obtaining the requested material as having "violated the Fourth Amendment." 602 F.2d at 1011. Moreover, during oral argument below, as well as on many occasions in the past, the government conceded the illegality of the said surveillance, "Here the FBI has conceded that the surveillance was 'in willful and flagrant violation of the Constitution and applicable Federal Law.'" 602 F.2d at 1013.

Reasons for not Granting the Writ

I. The Court of Appeals Properly Reconciled All of the Various Competing Interests Here Involved.

Confronted with a variety of conflicting claims, the Court of Appeals correctly reconciled them by holding, in brief, that, "by passing Title III . . . Congress had decided that the right to privacy created by illegal electronic surveillance is too great to permit any disclosure of the fruits of such surveillance." 602 F.2d at 1013. While the court did not, *in haec verba*, adopt the full argument of intervenor-respondent that illegally obtained material is not disclosable under the relevant FOIA provisions, it reached the same result by finding, under the within facts and circumstances, that it was unthinkable that a Congress which enacted Title III could countenance a forced disclosure of material obtained by the FBI "in willful and flagrant violation of the Constitution and applicable Federal law." 602 F.2d at 1013. Under such circumstances, the First Circuit would—and did—afford critical weight "to a deliberate policy statement of Congress *relative to the precise circumstances we face here.*" *Id.* (emphasis added).

CONCLUSION

To grant the petition for certiorari would be to put in doubt the narrow issue decided by the Court of Appeals which leaves for another day and an appropriate case the broad question of "a new, general exemption for illegally obtained information." 602 F.2d at 1014. It decides only that the "contents" of "wire" or "oral" communications interrupted in violation of the Constitution or federal law prior to the effective date of Title III may not be involuntarily disclosed by the agency responsible

for its interception. *Id.* Such a ruling is both reasonable and equitable. The issue before this Court, and the only one reasonably susceptible to review on the record below, is far narrower than petitioner would have it believe and, in the view of respondent-intervenor, was correctly resolved by the Court of Appeals.

Respectfully submitted,

WILLIAM M. KUNSTLER
853 Broadway
New York, New York 10003
(212) 674 - 3303

HARRIS L. BERSON
215 Broadway
Providence, Rhode Island 02903
(401) 272 - 3900
Counsel for Intervenor-Respondent

Dated: New York, New York
December 11, 1979